TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 188

THE UNITED STATES, PETITIONER

vs.

COWDEN MANUFACTURING COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED JUNE 27, 1940
CERTIORARI GRANTED OCTOBER 14, 1940

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1

In the Court of Claims

No. 44307

COWDEN MANUFACTURING COMPANY, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

I. *Petition*

Filed Dec. 1, 1938

To the Honorable, the Chief Justice and the Judges of the Court of Claims;

I

The plaintiff is, and at all times hereinafter mentioned was, a corporation duly organized and existing under the laws of the State of Missouri, with its principal offices and place of business at 412 West 8th Street, Kansas City, Missouri, and engaged in the business of manufacturing garments, particularly service suits, overalls, playsuits, and pants for sale to various buyers, including the United States of America.

2

II

The plaintiff, in accordance with the general practice of public bidding required by law and followed by the various Departments of the United States Government, particularly the War Department, submitted its bid and obtained the award of Contract Number W669–2M4800 (O. I. 2538), dated June 24, 1933, and approved July 5, 1933, for shipment of 23,496 suits, mechanics type B–1 @ $1.90 or an aggregate price of $44,642.40, to supply the Quartermaster Corps, at Philadelphia, Pennsylvania, between June 24, 1933, and October 22, 1933. That pursuant to a change order dated July 5, 1933, approved August 8, 1933, under and by virtue of the provisions of Article 7 of said contract, the same was increased upon written order from the contracting officer of the War Department and the plaintiff was required to and did supply 11,724 additional suits, mechanics type B–1 @ $1.90 or an aggregate price of $22,275.60, making the total number of suits, mechanics type B–1, 35,220 @ $1.90, or an aggregate of $66,918.00 furnished under the said contract.

The plaintiff states that in accordance with said contract and all extension agreements made thereunder with the War Depart-

III

ment, the plaintiff agreed to sell and deliver to the defendant, the defendant agreed to accept delivery and did in fact accept delivery of the aforementioned mechanics suits, all of which is related more specifically as follows: The plaintiff shipped September 16, 1933, 12,480 mechanics suits for which it received payment that day the sum of $23,712.00 by check #52224,
3 shipped September 29, 1933, 6,522 mechanics suits for which it received payment on that day the sum of $12,391.80 by check #53474, shipped October 13, 1933, 4,900 mechanics suits for which it received payment on that day the sum of $9,310.00 by check #54707, and shipped 11,318 mechanics suits on November 10, 1933, for which it received payment of the sum of $21,504.20, making a grand total of 35,220 mechanics suits shipped to and a total payment of $66,918.00 by the War Department of the United States.

IV

Among other things plaintiff and defendant agreed that the prices set forth in the contract included any Federal Tax imposed by Congress prior to the submission of the plaintiff's bid and that said prices were to be increased or decreased accordingly, in the event that Congress should change said taxes subsequent to the opening of said bid, the exact provision of Article I being as follows:

"Prices set forth herein include any Federal Tax heretofore imposed by the Congress which is applicable to the material purchased under this contract. If any sales tax, processing tax, adjustment charge, or other taxes or charges are imposed or charged by the Congress after the date set for the opening of the bid upon which this contract is based and made applicable directly upon the production, manufacture or sale of the supplies covered by this contract and are paid by the contractor on the articles or supplies herein contracted for, then the prices named in this contract will be increased or decreased accordingly and any amount due the contractor as a result of such change will be charged to the government and entered on vouchers (or invoices) as separate items."

V

4 The plaintiff states that immediately upon execution of said contract with the War Department, it entered into agreements with certain subcontractors for the purchase of mate-

rials with which to manufacture the mechanics suits sold thereunder. That on the 23rd day of July, 1933, the plaintiff purchased from McCampbell and Company, 320 Broadway, New York, selling agents for Graniteville Manufacturing Company of Graniteville, South Carolina, 150,000 yards, 28 inch aviation corps material, olive drab, shrunk, @ 21¢, with the privilege of increasing the option 50%. That thereafter and on the 30th day of July, 1933, the plaintiff exercised its option agreement and did purchase an additional amount of the aviation corps material, aforesaid, at the contract price of 21¢ per yard.

That said goods, aggregating 213,127¾ yards were furnished by the said subcontractor and shipped to the plaintiff at stated intervals. Moreover, the plaintiff purchased 885⅔ units of thread from the American Thread Company and 33,897 cotton labels from the Artistic Weaving Company, all of which materials were furnished by said subcontractors to the plaintiff to be used in the manufacture of mechanics suits to fulfill the aforesaid contract with the War Department.

VI

That on May 12, 1933, the Congress of the United States enacted the Agricultural Adjustment Act by virtue of which, there was imposed upon the said subcontractors, subsequent to the date of the opening of the bid of the contract between the plaintiff and the defendant, certain processing taxes which said subcontractors were compelled to pay to the United States as follows:

McCampbell and Company, processing tax on 213,127¾ yards of aviation corps material, $4,425.54;

American Thread Company, processing tax on 885⅔ units of thread, $44.44;

The Artistic Weaving Company, processing tax on 38,897 cotton labels, $14.45.

VII

The plaintiff was compelled by the terms of its agreements with said subcontractors to pay the above set forth processing taxes to the subcontractors; by reason of the provisions of the contract, set forth hereinabove in Paragraph IV between the plaintiff and the Government, the amount representing the said processing taxes became an increased charge to the Government under the contract, and has never been paid but on the contrary has been withheld from the plaintiff without just cause.

VIII

The total amount of indebtedness owed the plaintiff by the United States by reason of the payment of processing taxes to subcontractors assessed under the Agricultural Adjustment Act against said subcontractors as shown by the aforesaid allegation of facts is $4,484.43.

IX

The plaintiff submitted its claim to the War Department which was subsequently referred to the Comptroller General of the United States. The claim was finally denied by the said
6 Comptroller General of the United States in his decision of August 11, 1938, A–68085. This petition is respectfully submitted as an appeal from that decision on the grounds that said decision was erroneously given.

X

Your plaintiff is not afforded an appeal to any other department of the Executive Branch of the Government respecting this claim. No action upon this claim, other than that herein stated, excepting that referred to, has been taken before Congress or any of the departments of the United States, or in any Court other than the petition filed in this Court.

XI

Your plaintiff has at all times, through its officers and agents, borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against said Government. Your plaintiff is the sole and absolute owner of the claim herewith presented, and has made no transfer or assignment of said claim or any part thereof, and is justly entitled to the amount claimed herein from the United States after allowing all just credits and set-offs.

XII

Your plaintiff believes the facts as herein stated are true.

Wherefore, your plaintiff prays judgment in its favor against the United States of America in the sum of $4,484.43 for monies wrongfully withheld from it and for interest at 6% per
7 annum from August 11, 1938, to date of payment, and for

such other and further relief as in the premises to this Court may seem meet and proper.

PHIL D. MORELOCK,
630 Shoreham Building, Washington, D. C.
Attorney for Plaintiff.

Of Counsel:
GEORGE P. LAMB,
630 Shoreham Building, Washington, D. C.
[*Duly sworn to by Phil D. Morelock, jurat omitted in printing.*]

8 II. *General traverse*

Filed January 10, 1939

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

JAMES W. MORRIS,
Assistant Attorney General.

G. P.
F. K. D.

III. *Argument and submission of case*

On March 5, 1940, the case was argued and submitted on merits by Mr. Phil D. Morelock for plaintiff, and by Mr. Guy Patten for defendant.

9 IV. *Special findings of fact, conclusion of law, and opinion of the court by Whitaker, J.*

Filed April 1, 1940

Mr. Phil D. Morelock for the plaintiff. George P. Lamb was on the brief.

Mr. Guy Patten, with whom was Mr. Assistant Attorney General Samuel O. Clark, Jr., for the defendant. Messrs. Robert N. Anderson and Fred K. Dyar were on the brief.

This case having been heard by the Court of Claims, the court, upon the basis of a stipulation of facts entered into between the parties, which is all the evidence introduced, makes the following

Special findings of fact

1. Plaintiff is a corporation organized and existing under the laws of the State of Missouri, with its principal offices and place of business at 412 West 8th Street, Kansas City, Missouri.

2. Plaintiff entered into a contract, No. W–669–qm–4800 (O. I. 2538), with the United States through the proper purchasing officer of the Quartermaster Corps, at Philadelphia, Pennsylvania, on June 24, 1933, in which the plaintiff agreed to sell to the United States and deliver at the Quartermaster Depot in Philadelphia, Pennsylvania, 23,496 suits, mechanics type B–1 @ $1.90, for which the United States agreed to pay $44,642.40. Pursuant to a change order dated July 5, 1933, under and by virtue of the provisions of Article 7 of said contract, the total was increased upon written order from the contracting officer of the War Department, and the plaintiff was required to and did supply 11,724 additional suits, mechanics type B–1 @ $1.90, for which the United States agreed to pay $22,275.60. The total number of suits furnished under the contract was 35,220, at an aggregate price of $66,918, which suits were accepted and approved by defendant and said sum of $66,918 has heretofore been paid to plaintiff as by said contract provided.

3. The contract of June 24, 1933, was made pursuant to a bid submitted to the War Department by the plaintiff June 6, 1933. Both the bid and the contract contained the following provision:

"Prices set forth herein include any Federal Tax heretofore imposed by the Congress which is applicable to the material purchased under this contract. If any sales tax, processing tax, adjustment charge, or other taxes or charges are imposed or changed by the Congress after the date set for the opening of the bid upon which this contract is based and made applicable directly upon the production, manufacture, or sale of the supplies covered by this contract and are paid by the contractor on the articles or supplies herein contracted for, then the prices named in this contract will be increased or decreased accordingly and any amount due the contractor as a result of such change will be charged to the government and entered on vouchers (or invoices) as separate items."

4. Plaintiff manufactured the suits involved in the aforesaid contract, and in the manufacture thereof it used 213,127¾ yards of cotton cloth which it purchased from McCampbell and Company, 320 Broadway, New York, selling agent for Graniteville Manufacturing Company of South Carolina, a first domestic processor of cotton.

The confirmation by McCampbell and Company of plaintiff's order, dated June 23, 1933, for the aforesaid cotton cloth contained the following provision:

"The prices stated herein are based upon present manufacturing conditions and cost thereunder. If such cost is increased by any Federal taxes or by the administration of the Industrial

Recovery Act, the Agricultural Adjustment Act, or by any Federal regulations or Federally approved codes and practices, affecting costs, not now in force, the amount of such in-
11 creased cost shall be added to the prices stated and delivery shall be extended in proportion to any limitation of production caused thereby."

Pursuant to the above provision, McCampbell and Company billed plaintiff, as a separate item in its invoices for the above-mentioned cotton cloth, for the amount of tax applicable to the processing of the cotton from which said cloth was manufactured, to-wit, the sum of $4,425.54, which amount plaintiff paid to McCampbell and Company. Processing taxes in the same amount were paid by Graniteville Manufacturing Company, the processor, to the Collector of Internal Revenue, which amount was included in larger amounts of processing taxes paid by said processor.

5. In manufacturing the aforesaid suits, plaintiff used 885⅔ units of cotton thread which it purchased from American Thread Company, a first domestic processor of cotton. The confirmation by American Thread Company of plaintiff's order, dated June 24, 1933, for said cotton thread, contained the following provision:

"In addition to the prices upon which this contract of sale is based, buyer agrees to pay any additional costs resulting from any sales tax or taxes and/or domestic allotment charges that may be imposed by the Federal, State, and/or local government and applicable to any items on this contract at time of shipment."

Pursuant to the above provision, American Thread Company, a first domestic processor of cotton, billed plaintiff, as a separate item in its invoices for the above-mentioned cotton thread, for the amount of tax applicable to the processing of cotton from which said thread was manufactured, to-wit, the sum of $44.44, which amount plaintiff paid to American Thread Company. Processing taxes in the same amount were paid by American Thread Company, the processor, to the Collector of Internal Revenue, which amount was included in larger amounts of processing taxes paid by said processor.

6. Plaintiff duly made claim and demand against the United States, with the War Department, that the contract price for the mechanics suits be increased by the sum of $4,469.98,
12 being the processing tax applicable to the processing of the cotton used in manufacturing and processing the supplies which plaintiff purchased and used, as aforesaid, to manufacture said mechanics suits.

The claim was referred, subsequently, to the Comptroller General of the United States, and was denied and rejected by said Comptroller General in his decision of August 11, 1936, A–68085.

7. The Secretary of Agriculture, in accordance with authority vested in him by the provisions of the Agricultural Adjustment Act of May 12, 1933 (48 Stat. 31), as amended, for the purposes of said Act, prescribed that the first marketing year for cotton began August 1, 1933, and fixed the rate of tax at 4.2 cents per pound beginning August 1, 1933. The processing taxes of $4,469.98 were assessed and paid subsequent to the contracts entered into between the plaintiff and the War Department and subsequent to the agreements between the plaintiff and the processors.

8. Plaintiff is the sole owner of the claim sued upon, and has never transferred the same, or any part thereof, or any interest therein, and no action other than herein stated has been had on said claim through Congress, or in any of the Departments of the Government.

Conclusion of law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the Court decides as a conclusion of law that the plaintiff is entitled to recover the sum of $4,469.98.

It is therefore ordered and adjudged that the plaintiff recover of and from the United States the sum of four thousand four hundred sixty-nine dollars and ninety-eight cents ($4,469.98).

Opinion

WHITAKER, Judge, delivered the opinion of the court:

The plaintiff entered into a contract with the defendant on June 24, 1933, to furnish a certain number of suits of a certain type for a specified price. The contract entered into
13 contained the following provision, known as the "Federal Taxes" provision:

"Prices set forth herein include any Federal Tax heretofore imposed by the Congress which is applicable to the material purchased under this contract. If any sales tax, processing tax, adjustment charge, or other taxes or charges are imposed or changed by the Congress after the date set for the opening of the bid upon which this contract is based and made applicable directly upon the production, manufacture, or sale of the supplies covered by this contract and are paid by the contractor on the articles or supplies herein contracted for, then the prices named in this contract will be increased or decreased accordingly and any amount due the contractor as a result of such change will be

charged to the government and entered on vouchers (or invoices) as separate items."

In order to carry out its contract the plaintiff purchased cotton cloth and cotton thread at a certain price, plus the amount of any taxes levied by the Industrial Recovery Act, the Agricultural Adjustment Act, and others. After the purchase of the cloth and thread the vendors thereof paid processing taxes thereon in the total amount of $4,469.98, for which amount they were reimbursed by the plaintiff. The plaintiff then made demand on the defendant for an additional payment to it of this amount under the "Federal Taxes" provision of its contract. The claim was denied and this suit was brought.

The defendant defends on the ground that the Agricultural Adjustment Act was passed prior to the date of plaintiff's contract and, therefore, under the "Federal Taxes" provision of the contract plaintiff is not entitled to any additional payment on account of the taxes levied by that Act. That provision recites that the prices set forth therein include any Federal tax "heretofore imposed by the Congress," but the defendant agreed to pay an additional sum to the contractor in case any processing tax, among others, is "imposed or changed by the Congress *after* the date set for the opening of the bid upon which this contract is based." [Italics ours.]

While the Agricultural Adjustment Act was passed prior to the date of the contract, it did not definitely provide for
14 any tax on the processing of cotton, nor did it specify the amount thereof, if one should be imposed, nor when it should become effective. Its provisions with respect to a processing tax on cotton are as follows:

In section 2 (1) Congress declared that it was its purpose in passing the Act, among others,

"To establish and maintain such balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will reestablish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy equivalent to the purchasing power of agricultural commodities in the base period."

In section 8 the Secretary of Agriculture is given power, in order to effectuate the declared policy, to provide, among other things, for reduction in the acreage of any basic agricultural commodity, and "to provide for rental or benefit payments in connection therewith * * * in such amounts as the Secretary deems fair and reasonable."

In section 9 (a) it is provided:

"When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic

agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation. * * * The rate of tax shall conform to the requirements of subsection (b)."

In subsection (b) it is provided:

"The processing tax shall be at such rate as equals the difference between the current average farm price for the commodity and the fair exchange value of the commodity; * * *"

unless the Secretary concludes that the tax at such rate would cause an accumulation of surplus stocks or a depression of the farm price of the commodity, in which event it is provided that "the processing tax shall be at such rate as will prevent such accumulation of surplus stocks and depression of the farm price of the commodity."

15 From the foregoing quotations from the Act it is obvious that with respect to cotton, for instance, it was unknown after the passage of the Act whether or not there would be any processing tax with respect thereto. Whether or not there should be was dependent upon the future action of the Secretary of Agriculture. No processing tax on cotton became effective until the Secretary had determined that rental or benefit payments should be made with respect thereto. Whether or not he would ever make such determination was unknown, although it might reasonably have been anticipated. But even so, it was impossible to determine from the Act when the tax should become effective, since it would not become effective until the beginning of the marketing year after such determination of the Secretary. The plaintiff, therefore, did not know when it entered into its contract whether or not it would have to pay any processing taxes.

Nor could the rate of the tax be determined from the Act. The Act authorized the Secretary of Agriculture to determine the rate at such amount as would equalize the current average farm price of the commodity and the fair exchange value of the commodity. The plaintiff manifestly was unable to tell therefrom what rate the Secretary would fix. Moreover, the Secretary was not bound by this formula if he believed that its application would result in an accumulation of surplus stocks of the commodity or in the depression of its price. In this event he was authorized to fix a different rate, one that would prevent such accumulation of stocks or depression of price.

Even after the rate had been fixed by the Secretary, he had the right under the Act to vary it from time to time if he found this necessary in order to effectuate the declared purpose of Congress in passing the Act.

It is manifest, therefore, that it was impossible for either the plaintiff or its vendors to have determined the amount of the tax which it would be necessary to pay.

Under such circumstances we cannot say that these taxes had been "imposed" prior to the date of plaintiff's contract with the defendant, within the meaning in which that word was used in the contract. Authority had been conferred by
16 Congress for the imposition of the tax, but that authority had not been exercised until thereafter, to wit, on July 14, 1933. The purpose of the Federal Taxes provision of the contract was to reimburse the contractor for its additional costs brought about by the defendant's act in levying additional taxes. The taxes were not in effect when the contract was made and it was impossible for the contractor to ascertain when they would go into effect or the amount of them when they did. Therefore it could not figure what to include in its costs on account of them.

We are, therefore, of opinion that the processing taxes paid by the plaintiff were taxes "imposed or changed by the Congress after the date set for the opening of the bid upon which this contract is based." The action of Congress in imposing the tax was not complete until action by its delegate, the Secretary of Agriculture, and this was after the contract was made.

All other questions raised by the defendant have been disposed of by our decisions in Batavia Mills, Inc., v. The United States, 85 Ct. Cls., 447, and The Telescope Folding Furniture Company, Inc., v. The United States, decided March 4, 1940.

It results that plaintiff is entitled to recover of the defendant the sum of $4,469.98. It is so ordered.

LITTLETON, Judge; GREEN, Judge; and WHALEY, Chief Justice, concur.

WILLIAMS, Judge, took no part in the decision of this case.

17 V. *Judgment*

At a Court of Claims held in the City of Washington on the 1st day of April, A. D. 1940, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is entitled to recover the sum of $4,469.98.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of four thousand four hundred sixty-nine dollars and ninety-eight cents ($4,469.98).

18 [Clerk's certificate to foregoing transcript omitted in printing.]

[Endorsement on cover:] Enter Attorney General. File No. 44537. Court of Claims. Term No. 188. The United States, Petitioner vs. Cowden Manufacturing Company. Petition for writ of certiorari and exhibit thereto. Filed June 27, 1940. Term No. 188 O. T. 1940.

U. S. GOVERNMENT PRINTING OFFICE: 1940

Supreme Court of the United States

Order allowing certiorari

Filed October 14, 1940

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1940